

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY—TERMINAL TRACKAGE RIGHTS—KANSAS CITY  
SOUTHERN RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY

Decision No. 7

Digest:<sup>1</sup> In this decision, the Board orders the parties to engage in Board-sponsored mediation to resolve disputes regarding the conditions of and compensation for BNSF Railway Company's use of the Rosebluff Lead.

Decided: July 2, 2019

On February 27, 2013, BNSF Railway Company (BNSF) filed with the Board an application for terminal trackage rights over the Rosebluff Lead, a track in Lake Charles, La., that is jointly owned by Kansas City Southern Railway Company (KCS) and Union Pacific Railroad Company (UP).<sup>2</sup> Following BNSF's application, the Board ordered the parties to engage in mandatory mediation. BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 1), FD 32760 (Sub-No. 46) (STB served Apr. 14, 2014). That mediation ended without successful resolution of the dispute, and the Board proceeded to consider BNSF's application. In Decision No. 3, the Board granted BNSF terminal trackage rights over the Rosebluff Lead to facilitate BNSF's direct access to Lake Charles area shippers (including shippers at West Lake Charles, La.). The Board stated that, under 49 U.S.C. § 11102(a), the rail

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> The application was filed pursuant to conditions that the Board placed on a 1996 merger between the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) (collectively, SP). See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 1 S.T.B. 233, 241 (1996). For additional background, see BNSF Railway—Terminal Trackage Rights—Kansas City Southern Railway (Decision No. 3), FD 32760 (Sub-No. 46), slip op. at 2-3 (STB served July 5, 2016).

carriers (not the Board) are initially responsible for establishing conditions and compensation for BNSF's use of the terminal facilities and that, if the carriers cannot agree, the Board may establish such conditions and compensation. Decision No. 3, slip op. at 18-20. The parties attempted, but failed, to reach an agreement.

By petition filed on January 12, 2018, BNSF has requested that the Board establish conditions of use and compensation for BNSF to directly serve a LyondellBasell (Lyondell) facility at West Lake Charles, La., "over the Rosebluff Lead and related tracks via the terminal trackage rights granted by the Board" in Decision No. 3. After KCS, UP, and BNSF all indicated a willingness to participate in Board-sponsored mediation, the Board initiated mediation in May 2018. See BNSF Ry.—Terminal Trackage Rights—Kan. City S. Ry. (Decision No. 5), FD 32760 (Sub-No. 46), slip op. at 2 (STB served May 15, 2018). That mediation ended without successful resolution of the dispute, and the parties continued to file pleadings to build the record regarding the Board's establishment of conditions of use and compensation. Those issues remain pending before the Board.

On June 18, 2019, KCS and UP filed a joint request for mediation using the services of the Federal Mediation and Conciliation Service (FMCS), in conjunction with Board staff. KCS and UP state that, given the complex issues presented in this proceeding, all parties would benefit from mediation using both Board staff and the services of the FMCS to break through difficult issues and to reach a negotiated resolution, which would serve all parties and affected shippers. (Joint Request 2, June 18, 2019.)

On June 25, 2019, BNSF replied to the joint request for mediation, noting that, despite previous attempts at mediation and private negotiation throughout this proceeding, parties have been unable to reach a mutually agreed solution. (BNSF Reply 2, June 25, 2019.) BNSF states that, should the Board initiate another round of mediation, it should condition mediation on: (1) not holding this proceeding in abeyance, (2) limiting the issues to be mediated to those relating to conditions of use and compensation and not whether BNSF is entitled to direct access to the Rosebluff Lead, and (3) requiring KCS and UP to pre-identify the issues they are willing to mediate. (Id. at 3.) On July 1, 2019, KCS replied to BNSF's reply, stating that it is willing to accept BNSF's mediation conditions. (KCS Reply 1-2, July 1, 2019.)

The Board favors the resolution of disputes through mediation in lieu of formal Board proceedings whenever possible. 49 C.F.R. § 1109.1. The Board will order the parties to engage in Board-sponsored mediation pursuant to 49 C.F.R. § 1109.2(a)(1). Given the unique circumstances of this proceeding, the Board finds good cause here to waive the restriction at 49 C.F.R. § 1109.3(b), under which the Board will not order mediation more than once in any proceeding unless all parties to a matter mutually request another round of mediation.<sup>3</sup> When the

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<sup>3</sup> The Board may waive its regulations, see 49 C.F.R. § 1110.9, and has done so on its own motion in various contexts. See, e.g., Reciprocal Switching, EP 711 (Sub-No. 1), slip op. at 28-29 (STB served July 27, 2016); U.S. Rail Serv. Issues—Performance Data Reporting, EP 724

(continued . . .)

Board ordered mandatory mediation by its own order in 2014, the Board had yet to grant BNSF's application for terminal trackage rights on the Rosebluff Lead. Thus, at that early stage of the proceeding, the parties entered meditation disputing the basic threshold issue of BNSF's direct access to the Lake Charles area. See Decision No. 1, slip op. at 1-2. Now that the Board has determined that BNSF has the right to directly access the Rosebluff Lead via terminal trackage rights, see Decision No. 3, slip op. at 10, the unresolved issues pertain only to the conditions and compensation for BNSF's use of the Rosebluff Lead. With the dispute narrowed to these issues, and where two of the three parties have expressed a renewed interest and optimism in resolving this dispute through mediation,<sup>4</sup> the Board finds good cause to waive the restriction under § 1109.3(b).

The Chairman will soon appoint one or more mediators pursuant to 49 C.F.R. § 1109.3(a). Once appointed, the mediator or mediators will contact the parties to discuss ground rules and the time and location of any meetings. At least one principal of each party, who has authority to commit that party, shall participate in the mediation and be present at any session at which the mediator or mediators request(s) that the principal be present.<sup>5</sup> The mediation period shall be 30 days, beginning on the date of the first mediation session. 49 C.F.R. § 1109.3(b). The parties may request to extend mediation by mutual written requests of all parties to the mediation proceeding. Id. The mediator or mediators are instructed to inform the Board when mediation has ended, with or without a resolution.

It is ordered:

1. The parties are directed to engage in mediation.
2. This decision is effective on the date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.

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(Sub-No. 4), slip op. at 2-3 (STB served Nov. 9, 2015); Ark. Midland R.R.—Trackage Rights Exemption—Caddo Valley R.R., FD 35530, slip op. at 2 (STB served June 14, 2011).

<sup>4</sup> As noted above, when the Board initiated mediation in May 2018, KCS, UP, and BNSF all indicated a willingness to participate in Board-sponsored mediation. See Decision No. 5, slip op. at 1-2.

<sup>5</sup> Although the exact format and scope of mediation will not be determined at this time, the mediator will seek to effectuate the wishes of the parties to the extent appropriate.